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State v. Rhoads Respondent's Brief Dckt. 39989

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, vs. JAMES RHOADS, Defendant-Appellant.	)	No. 39989 Ada Co. Case No. CR-2011-5455

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

Nature Of The Case 1

Statement Of Facts And Course Of Proceedings 1

ISSUE 6

ARGUMENT 7

Ms. Holland's Statement To Rhoads Was Admissible As A Prior Consistent Statement Such That This Court Need Not Address Whether The Court Abused Its Discretion In Concluding It Was An Excited Utterance; Alternatively, Rhoads Has Failed To Establish The District Court Abused Its Discretion In Admitting The Statement As An Excited Utterance 7

A. Introduction 7

B. Standard Of Review 11

C. Rhoads Has Failed To Show Error Because He Has Not Challenged The District Court's Ruling That Ms. Holland's Statement Was Admissible As A Prior Consistent Statement Under I.R.E. 801(d)(1)(B) 12

D. Rhoads Has Failed To Show The District Court Abused Its Discretion In Admitting The Statement As An Excited Utterance 13

E. Ms. Holland's Statement Was Admissible As A Prior Consistent Statement And Was Substantive Evidence Of Rhoads' Guilt 15

F. Any Error In The Admission Of Ms. Holland's Statement Was Harmless 18

CONCLUSION 20

CERTIFICATE OF SERVICE 20

TABLE OF AUTHORITIES

CASES **PAGE**

Chacon v. Sperry Corp., 111 Idaho 270, 723 P.2d 814 (1986) 17

Chapman v. California, 386 U.S. 18 (1967) 19

Neder v. United States, 527 U.S. 1 (1999) 19

State v. Caldero, 109 Idaho 80, 705 P.2d 85 (Ct. App. 1985) 17

State v. Field, 144 Idaho 559, 165 P.3d 273 (2007) 13

State v. Goodwin, 131 Idaho 364, 956 P.2d 1311 (Ct. App. 1998) 12

State v. Hansen, 133 Idaho 323, 986 P.2d 346 (Ct. App. 1999) 13

State v. Healy, 151 Idaho 734, 264 P.3d 75 (Ct. App. 2011) 11

State v. Johnson, 148 Idaho 664, 227 P.3d 918 (2010) 19

Tome v. United States, 513 U.S. 150 (1995) 18

RULES

F.R.E. 801 ..... 17, 18

I.C.R. 52 18

I.R.E. 103 18

I.R.E. 801 ..... passim

STATEMENT OF THE CASE

Nature Of The Case

James Gerald Rhoads appeals from the judgment of conviction entered upon a jury verdict finding him guilty of felony driving while under the under the influence and operating a vehicle without the owner's consent.

Statement Of Facts And Course Of Proceedings

The following rendition of facts is based on testimony presented at trial. On the morning of April 10, 2011, Sherry Kreisher, Cara Holland, and Rhoads were at a house where Rhoads had been staying ("Jake's house"), and Rhoads and Ms. Holland were drinking beer. (Tr., p.117, L.10 – p.120, L.18.) After Rhoads consumed about five or six beers, the three left Jake's house and went to a store and bought a gallon of wine, and then went to Ms. Kreisher's apartment. (Tr., p.121, Ls.1-22.) While at the apartment, Rhoads and Ms. Holland drank wine and were acting like they were drunk. (Tr., p.122, L.11 – p.123, L.16.) Rhoads left the apartment for a while to go to a "band function" (Tr., p.122, L.20 – p.123, L.19), and upon his return, he and Ms. Holland went to the back patio for about ten minutes to smoke cigarettes, and when they returned, Rhoads grabbed the bottle of wine and he and Ms. Holland went out the front door. (Tr., p.124, L.15 – p.125, L.8.)

Ms. Kreisher finished watching a movie, and after doing some house chores, she noticed that her car was gone from the driveway, and she had not given anyone permission to take it. (Tr., p.125, L.11 – p.126, L.6.) After contacting the police and reporting the car being taken, she received a call from the police that her "friends that

had borrowed [her] car were in an accident and that they had [her] car" on Bogus Basis Road. (Tr., p.127, Ls.10-21.) Ms. Kreisher drove to the site of the accident, and saw "[her] car being held by a barbed wire fence from rolling down the mountain and a lot of damage done to it." (Tr., p.127, L.22 – p.128, L.3.) Ms. Kreisher explained that her car was not drivable, it had lots of body damage, the bumper was hanging off, the windshield was shattered and the inside was covered in mud. (Tr., p.128, Ls.19-23.) While at the scene, Ms. Kreisher watched one of the officers pull Rhoads' sunglasses from the car; they were "[n]ext to the driver's seat in between the seat and where the door would close." (Tr., p.134, L.24 – p.135, L.25.)

Ms. Holland testified that she was intoxicated when she was at Ms. Kreisher's apartment, and remembered lying on the couch because she was "overly drunk, just trying to rest it off . . . ." (Tr., p.183, L.13-23.) The next thing she remembered was looking for cigarettes in the middle console between the two seats in the car, which was being driven by Rhoads. (Tr., p.184, L.2 – p.185, L.8.) Ms. Holland next recalled "[l]aying back in my seat and waking up, trying to crawl out of the passenger door." (Tr., p.185, L.25 – p.186, L.4.) When she was waking up, Rhoads was beside her, trying to climb out right behind her. (Tr., p.187, Ls.7-11.) Ms. Holland suffered a slight bruising on the top of her head, and after going to an emergency room for treatment a couple of days later, she was diagnosed as having a severe concussion, back strain, and abdominal strain.[1] (Tr., p.187, L.14 - 190, L.15.) Ms. Holland saw the car a few days after the accident, and noticed that the front windshield was shattered on the passenger

[1] Dr. Benjamin Cornett, the physician who examined Ms. Holland on April 13, 2011, diagnosed her as likely having suffered a concussion. (Tr., p.282, Ls.8-15.)

side in the top corner. (Tr., p.188, Ls.5-20.) Michael Guryan testified that when he and his wife were driving down Bogus Basis Road, they "saw two people kind of standing, kind of struggling or arguing with each other[,]" who were covered with mud from their knees down. (Tr., p.337, Ls.1-22.) Mr. Guryan stopped to see if the couple were hurt, and then noticed a car "hanging in the barbed wire off the side of the road and put the tailgate down and had them sit down." (Tr., p.338, L.21 – p. 339, L.4.) Mr. Guryan and his wife wiped the mud off the two people and noted that "the woman was really ticked at the guy. (Tr., p.339, Ls.12-16.) Mr. Guryan saw the woman take a swing at the man, "like pounding him on [the] shoulder or the arm . . . like a half swing." (Tr., p.340, Ls.9-13.) Mr. Guryan called 911 to report the incident, and when he told the man that he had done so, the man became pretty upset and the two people involved in the accident started walking down the road barefoot. (Tr., p.343, L.10 – p.345, L.1.) Mr. Guryan notified dispatch that the two people were taking off, and he was informed he could leave, which he did. (Tr., p.345, Ls.7-12.)

Deputy Sheriff Shannon Miller was dispatched to the crash site, where she contacted Ms. Holland and Rhoads. (Tr., p.244, L.11 – p.245, L.16.) Deputy Miller noticed that both Ms. Holland and Rhoads were muddy and intoxicated, and "right off the bat, they told [her] that a guy named 'Jeff' was driving." (Tr. p.245, L.17 – p.246, L.6; p.253, L.s2-18.) Deputy Miller also saw that the car that crashed "was located basically on an edge of a cliff. A barbed wire fence was literally holding the car up." (Tr., p.247, Ls.14-18.) In the back seat of the crashed car was a gallon of wine. (Tr., p.253, L.22 – p.254, L.4.) During the time she was investigating the accident at the scene, Ms. Holland and Rhoads sat inside the deputy's patrol vehicle because it was

cold outside, and the vehicle's video-recording system that shows the back seat was functioning and running. (Tr., p.247, Ls.4-12; p.252, L.13-17; p.254, Ls.13-23; see St. Ex. 8.) A review of that videotape shows clearly that Rhoads created the "Jeff" story to cover for the fact that he (Rhoads) had been driving the car when it crashed, and, given the many times he reminded Ms. Holland about "Jeff" being the driver, he was pre-occupied with making sure that Ms. Holland would stick to that story.

Deputy Sheriff Joshua Hale testified that at about 8:00 p.m. on April 10, 2011, he went to the crash scene, and Deputy Miller was already there. (Tr., p.297, L.20 - p.298, L.18.) After contacting Mr. Holland and Rhoads, both told him that a man named Jeff had been driving the car that crashed, and Rhoads said he did not know Jeff, and did not know where Jeff went. (Tr., p.300, Ls.3-23; see also p.201, L.1; p.203, L.19 – p.206, L.3.) Deputy Hale saw a pair of sunglasses "between the driver's side seat and the door." (Tr., p.301, Ls.11-13.) Deputy Hale noted that Rhoads "appeared to be extremely intoxicated; bloodshot, watery eyes; slurred speech; swaying back and forth; mood changes; odor or alcoholic beverage emanating from . . . his breath[,]" and after Rhoads said he had torn an ACL, the deputy did not have him perform the standardized field sobriety tests, and placed him under arrest. (Tr., p.304, L.17 – p.305, L.24.) Although Rhoads was uncooperative in giving breath samples during breath testing, he ultimately provided two samples that were "allowable" in regard to law enforcement policy, which resulted in blood alcohol content readings of .275 and .271. (Tr., p.309, L.14 – p.310, L.5; see St. Ex. 9 ("Lifeloc" printout).) Deputy Hale testified that he asked Rhoads if he had ever driven the car, and Rhoads said "no." (Tr., p.329, Ls.4-6.) When the deputy asked Rhoads, "[w]ould your fingerprints be on the steering?" Rhoads said

"[p]robably." (Tr., p.329, Ls.7-8.) When the deputy attempted to ask Rhoads how his fingerprints could be on the steering wheel if he had never driven the car, Rhoads "became uncooperative and the cussing and the accusations started." (Tr., p.329, L.9-14.)

At the end of the trial, the jury convicted Rhoads of felony driving under the influence and operating a vehicle without the owner's consent. (R., pp.150-152.) The district court sentenced Rhoads to concurrent sentences of ten years with four years fixed for felony driving under the influence, and five years with four years fixed for operating a vehicle without the owner's consent. (R., pp.158-163.) Rhoads filed a Motion for Correction or Reduction of Sentence pursuant to I.C.R. 35, which was denied. (R., pp.178-181, 199-202.) Rhoads filed a timely appeal. (R., pp.164-166.)

ISSUE

Rhoads states the issue on appeal as:

> Did the district court abuse its discretion by admitting hearsay statements of a co-defendant/accomplice where the remarks did not fall under the excited utterance exception to the hearsay rule?

(Appellant's Brief, p.8.)

The State rephrases the issue as:

Was Ms. Holland's initial statement to Rhoads admissible as a prior consistent statement such that this Court need not address whether the court abused its discretion in concluding it was an excited utterance? Alternatively, has Rhoads failed to establish the district court abused its discretion in admitting the statement as an excited utterance?

ARGUMENT

Ms. Holland's Statement To Rhoads Was Admissible As A Prior Consistent Statement Such That This Court Need Not Address Whether The Court Abused Its Discretion In Concluding It Was An Excited Utterance; Alternatively, Rhoads Has Failed To Establish The District Court Abused Its Discretion In Admitting The Statement As An Excited Utterance

A. Introduction

At the beginning of the second day of trial, after Ms. Holland had been thoroughly cross-examined about fabricating the story that "Jeff" had been the driver of the car, Rhoads' attorney said he would object, on hearsay grounds, to any testimony by Mr. Guryan that he heard Ms. Holland "say something to James about, 'Look what you did to my friend's car.'" (Tr., p.230, L.228 – p.231, L.5.) As an offer of proof, the prosecutor clarified the legal and factual basis for Mr. Guryan's anticipated testimony:

> [W]hat he intends to testify is that he was working at Bogus Basin. He came down. He saw Ms. Holland and Mr. Rhoads on the side of the road and stopped to render assistance.
>
> As he was coming up to them, at some point during that conversation or during that contact, Ms. Holland appeared to be highly agitated specifically with Mr. Rhoads, turned to him and stated, "I can't believe you wrecked" someone's name – he couldn't recall the name – "car."
>
> . . . .
>
> We do intend to admit that statement pursuant to 801(d)(1)(B).

(Tr., p.229, L.20 – p.230, L.12.) After the prosecutor read I.R.E. 801(d)(1)(B) to the court (Tr., p.230, Ls.12-18), and Rhoads' counsel asserted the statement was hearsay (Tr., p.231, Ls.18-20), the court opined:

> No, it is not for the truth of the matter. It is offered to rebut an implication that the prior witness had fabricated testimony. It is not offered for the truth of the matter asserted. It is offered to show that she made a

> consistent statement with regard to Mr. Rhoads driving the vehicle, and she has been attacked and cross-examined significantly over the issue of her recollection that Mr. Rhoads was driving the vehicle and got out of the car after her from the driver's seat.

(Tr., p.231, L.21 – p.232, L.6.)

Rhoads' attorney responded, "Judge, I agree with you," but asserted that the statement would be double hearsay. (Tr., p.232, Ls.8-10.) At that point, the district court explained that the statement "is a prior consistent statement which she made[,]" and offered to "instruct the jury that this is not proof; this is merely an indication that she made a prior statement consistent with her testimony. It is not proof that this actually happened this way; it is proof that she made a prior consistent statement." (Tr., p.232, Ls.11-21.) The court gave Rhoads the option of having a limiting instruction read to the jury either immediately after the statement was presented or when the other jury instructions were given; Rhoads' counsel asked for time to talk to Rhoads, but did not comment further at the time about which option he desired. (Tr., p.233, L.18 – p.234, L.1.)

After Rhoads and his attorney discussed matters, the district court raised the "excited utterance" exception as another basis for admitting the statement, saying:

> There is a basis also for an excited utterance, based upon what you have told me, in terms of they had just gotten [sic] into the car. They just gotten [sic] out of the car. She was still under the impact of what was going on and made an excited utterance that was also a consistent statement.

(Tr., p.234, L.23 – p.235, L.4.) The prosecutor then made an offer of proof to support an "excited utterance" ground for admitting Ms. Holland's statement, and Rhoads' counsel argued that the exception did not apply because Ms. Holland had had time to reflect after the car accident. (Tr., p.235, Ls.8-17; p.236, L.24 – p.237, L.5.) The court

ruled that, subject to laying a foundation, the state could introduce Ms. Holland's statement at trial as an excited utterance. (Tr., p.238, Ls.2-6.)

Later in the trial, the district court read the limiting instruction it intended to give the jury in regard to Mr. Guryan's testimony about Ms. Holland's statement, on the assumption the statement would be admitted as a prior consistent statement. (Tr., p.268, L.11 – p.270, L.7.) The prosecutor objected to the limiting instruction, contending that if the statement was admitted as an excited utterance, it "should come in as substantive." (Tr., p.270, Ls.16-22.) Rhoads' counsel did not object to the proposed limiting instruction, but requested he "be able to wait or make comment" on the instruction until after Mr. Guryan testified. (Tr., p.272, Ls.3-7.) The court agreed with the prosecutor, saying, "[i]f it is an excited utterance, it comes in for all purposes. If I determine there is not a basis for an excited utterance, it comes in as an attack on the – or for rehabilitation of the witness with a prior consistent statement." (Tr., p.272, Ls.9-14.)

Mr. Guryan testified that, after working a ski patrol shift at Bogus Basin, he and his wife drove down the road and "saw two people kind of standing, kind of struggling or arguing with each other[,]" who were covered with mud from their knees down. (Tr., p.337, Ls.1-22.) Mr. Guryan pulled to the side of the road and stopped his car to see if the couple (Ms. Holland and Rhoads) were hurt, and "then we saw a car, like, hanging in the barbed wire off the side of the road and put the tailgate down and had them sit down." (Tr., p.338, L.21 – p. 339, L.4.) Mr. Guryan explained that he and his wife wiped the mud off the two people and that "the woman was really ticked at the guy. And she kind of went, you know, "You wreck Cassie's" -- [,]" at which point Rhoads' counsel

objected. (Tr., p.339, Ls.15-19.) After both counsel discussed the objection at the bench and off the record, Mr. Guryan's testimony continued to lay the foundation for the excited utterance exception to be applied to the statement he heard Ms. Holland make, testifying that she took a swing at Rhoads, "kind of like pounding him on [the] shoulder or the arm, like kind of a half swing." (Tr. p.340, Ls.9-13.)

Just before the court made its ruling, Mr. Guryan was asked to more fully describe what led him to believe the female was upset, and he explained:

> She was – she yelled at him. She was really mad at him for wrecking her friend's car, and she said, "You know, you wrecked Cassie's car" or "Karen's car." I couldn't make out the name. She kind of swung at him at the same time and said, "You wrecked Cassie's car." She was really ticked at him.

(Tr., p.341, L.21 – p.342, L.3.) Mr. Guryan also testified that when Ms. Holland told Rhoads that he wrecked her friend's car, she did not appear to have engaged in "much of a thought process . . . [s]he was just really mad at him." (Tr., p.342, Ls.7-14.) The court stopped the testimony in order to make a finding on the record that, based on Mr. Guryan's testimony, the statement by Ms. Holland would be admitted as an excited utterance. (Tr., p.342, L.16 – p.343, L.7.)

After Mr. Guryan's testimony was completed and he was excused, Rhoads' counsel inquired about whether a curative instruction was supposed to be given to the jury. (Tr., p.354, Ls.13-22.) The court explained that "[t]he reason [it] did not read the limiting instruction was that it was based on the fact that the testimony was admitted for the limited purpose of basically a prior consistent statement. However, [the prosecutor] . . . successfully laid a foundation sufficient to allow that evidence to be admitted pursuant to the excited utterance exception." (Tr., p.354, L.23 – p.355, L.7.) Rhoads'

counsel again objected to the admission of Ms. Holland's statement on the ground that it "was not contemporaneous to when the incident happened[.]" (Tr., p.355, L.17 – p.356, L.5.) The court explained its decision in that regard:

> And the Court will note that one of the things that I paid particular attention to is the fact that the parties were still muddy from coming up the hill, and that is one of the reasons that I made the determination that this had occurred, and the parties were still under the influence of the event.

(Tr., p.356, Ls.6-13.)

On appeal, Rhoads contends that Mr. Guryan's testimony that he heard Ms. Holland tell Rhoads, "I can't believe you wrecked [. . . 's] car," was improperly admitted into evidence because, due to the passage of time, it did not qualify as an excited utterance. (Appellant Brief, pp.9-15.) Rhoads' claim fails irrespective of whether the statement was an excited utterance because the district court also admitted it as a prior consistent statement under I.R.E. 801(d)(1)(B), and Rhoads has not challenged that ruling on appeal.

Regardless, the district court correctly ruled that Ms. Holland's statement was admissible both as an excited utterance and prior consistent statement. Moreover, any error in admitting the statement was harmless.

B. Standard Of Review

"The decision whether to admit evidence at trial is generally within the province of the trial court." State v. Healy, 151 Idaho 734, 736, 264 P.3d 75, 77 (Ct. App. 2011) (citation omitted). "[A] trial court's determination as to the admission of evidence at trial will only be reversed where there has been an abuse of that discretion." Id.

C. Rhoads Has Failed To Show Error Because He Has Not Challenged The District Court's Ruling That Ms. Holland's Statement Was Admissible As A Prior Consistent Statement Under I.R.E. 801(d)(1)(B)

On appeal, Rhoads challenges the district court admission of Ms. Holland's statement on only one of the court's stated grounds – the excited utterance exception to the hearsay rule. (Appellant's Brief, pp.9-15.) However, Rhoads has not challenged the district court's ruling that Ms. Holland's statement was admissible under I.R.E. 801(d)(1)(B) as a prior consistent statement. (Id.; see Tr., p.232, Ls.11-21 (court's ruling).) Because Rhoads has not claimed that one of the two bases for admitting the evidence was error, his claim of error must be rejected.

Where a basis for a trial court's ruling is not challenged on appeal, an appellate court will affirm on the unchallenged basis. See State v. Goodwin, 131 Idaho 364, 366, 956 P.2d 1311, 1313 (Ct. App. 1998) (where trial court rules on two bases, appellate court will affirm on basis unchallenged on appeal). At no point on appeal does Rhoads address the district court's ruling that Ms. Holland's statement was admissible as a prior consistent statement. Thus, Rhoads has failed on appeal to challenge the district court's ruling, which ruling must be affirmed for want of challenge.

Moreover, Rhoads has failed to challenge the district court's decision to not give a limiting instruction in regard to the admission of Ms. Holland's statement as a prior consistent statement. Although the court did not give such an instruction because it also ruled the statement was admissible for substantive purposes as an excited utterance (Tr., p.354, L.23 – p.355, L.16), the fact remains that Rhoads has not asserted on appeal that the lack of a limiting instruction was error. Because he has not challenged either the court's holding that the evidence was properly admitted as a prior

consistent statement or that failure to give a limiting instruction was error, Rhoads has failed to demonstrate any error in the district court's admission of evidence of Ms. Holland's statement.

D. Rhoads Has Failed To Show The District Court Abused Its Discretion In Admitting The Statement As An Excited Utterance

Even if this Court addresses Rhoads' claim of error, he has failed to establish the district court abused its discretion in admitting evidence of Ms. Holland's statement that Rhoads wrecked the car under the excited utterance exception.

Rule 803(2) provides that "[a] statement relating to a startling event or condition made while the declarant is under the stress of excitement caused by the event or condition" is "not excluded by the hearsay rule, even though the declarant is available as a witness." The excited utterance exception "has two requirements: (1) an occurrence or event sufficiently startling to render inoperative the normal reflective thought process of an observer; and (2) the statement of the declarant must have been a spontaneous reaction to the occurrence or event and not the result of reflective thought." State v. Field, 144 Idaho 559, 568, 165 P.3d 273, 282 (2007) (citations omitted). In deciding whether a statement satisfies this exception, the Court considers the totality of the circumstances "including: 'the amount of time that elapsed between the startling event and the statement, the nature of the condition or event, the age and condition of the declarant, the presence or absence of self-interest, and whether the statement was volunteered or made in response to a question.'" Id. (quoting State v. Hansen, 133 Idaho 323, 325, 986 P.2d 346, 348 (Ct. App. 1999)).

Rhoads argues that Ms. Holland's statement that he wrecked her friend's car "occurred approximately 20-30 minutes after the accident" (Appellant's Brief, p.9), and that she "perhaps made some attempts to free the car" before she scrambled up a muddy embankment and began walking/staggering down the road[;]" therefore, Rhoads contends, her statement was not an excited utterance because it "was detached both by time and distance from the accident" (id. at 13).[2] Rhoads' argument places undue weight on the district court's subsequent statement that "one of the things [it] paid particular attention to is the fact that the parties were still muddy from coming up the hill, and that is one of the reasons [it] made the determination that . . . the parties were still under the influence of the event." (Tr., p.356, Ls.6-13; see Appellant's Brief, p.9 ("the presence of mud on one's clothing is not synonymous with a specific length of time").)

The circumstances surrounding Ms. Holland's statement to Rhoads show the district court correctly concluded that the statement was admissible as an excited utterance because she was still "under the stress or excitement caused by the [startling] event or condition." (Tr., p.342, L.18 – p.343, L.4.) The car Ms. Holland had ridden in was found hanging on the edge of a cliff, held up by a barbed wire fence (Tr., p.247, Ls.14-18; p.338, L.21 – p.339, L.4), and her legs were covered with mud from the knees down after climbing up the hill (Tr., p.337, Ls.1-22). Ms. Holland suffered from a back strain, an abdominal strain, and a severe concussion from hitting her head on the windshield. (Tr., p.187, L.14 – p.190, L.15.) When Mr. Guryan saw Ms. Holland and

[2] The portion of the record cited by Rhoads in no way supports his asserted time-frame of 20 to 30 minutes, and his claim of efforts to free the car is based exclusively on the presence of muddy handprints that the witness did not believe resulted from any effort to push the car. (See Appellant's Brief, p.9 (citing Tr., p.262, L.20 – p.263, L.10; p.337, Ls.15-22; p.346, Ls.10-19; p.348, Ls.3-7).)

Rhoads standing on the road, "she yelled at him," she was "really mad at him for wrecking her friend's car," she was "kind of like pounding him on [his] shoulder or the arm" like a half-swing, and without "much of a thought process" before she told Rhodes, "You wrecked [. . .'s] car" (Tr., p.337, Ls.20-22; p.341, L.21 – p.342, L.14).

Based on the totality of the circumstances, Rhoads has failed to establish the district court abused its discretion in admitting, as an excited utterance, Ms. Holland's statement to Rhoads that he wrecked her friend's car.

E. Ms. Holland's Statement Was Admissible As A Prior Consistent Statement And Was Substantive Evidence Of Rhoads' Guilt

The district court also ruled that Mr. Guryan would be permitted to testify that when he encountered Ms. Holland and Rhoads walking on the road, he heard Ms. Holland tell Rhoads, "I can't believe you wrecked" [someone's] "car," as a prior consistent statement under I.R.E. 801(d)(1)(B).[3] (Tr., p.230, L.1 - p.232, L.21.) The district court was correct to admit Ms. Holland's statement as a prior consistent statement. Moreover, the statement was admissible under that hearsay exception as substantive evidence of Rhoads' guilt.[4]

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[3] I.R.E. 801(d)(1)(B) reads in relevant part:

> (d) **Statements which are not hearsay.** A statement is not hearsay if –
>
> (1) **Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with declarant's testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive, ...

[4] The state acknowledges that the district court admitted Ms. Holland's statement as an excited utterance "for all purposes" but would have given a limiting instruction if the evidence was admitted only as a prior consistent statement. (Tr., p.268, L.11 – p.270,

During her direct examination, Ms. Holland testified that Rhoads was driving the car when it crashed. (Tr., p.185, Ls.1-5.) Much of Rhoads' cross-examination of Ms. Holland focused on her telling officers that a man named "Jeff" was driving the car when it crashed, and he had "taken off and left the scene." (Tr., p.205, Ls.14-25; see generally Tr., p.200, L.7 – p.206, L.3.) Thus, central to Rhoads' defense and his questioning of Ms. Holland was "an express or implied charge against [her] of recent fabrication or improper influence or motive." I.R.E. 801(d)(1)(B). The state was permitted to rebut this attack with Ms. Holland's prior consistent statement to Rhoads that, "You wrecked [. . . 's] car." Because offered to rebut a charge of recent fabrication based on statements to the police, evidence of Ms. Holland's statement to Rhoads was a prior consistent statement and not hearsay at all. Id.

Moreover, because the prior consistent statement was not hearsay, Ms. Holland's comment to Rhoads should have been ruled admissible as substantive evidence of his guilt, as is true of the similarly worded federal counterpart to I.R.E. 801(d)(1)(B).[5] The Idaho Rules of Evidence were adopted January 8, 1985, and made

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L.7; p.272, Ls.10-14.) Even if the excited utterance ground for admission is deemed invalid, the statement should have been admissible as a prior consistent statement "for all purposes."

[5] F.R.E. 801(d)(1)(B) reads:

> **(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:
>
> **(1) A Declarant-Witness's Prior Statement.**
> The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
>
> . . . .

effective July 1, 1985. When drafting the rules, the Idaho State Bar Evidence Committee applied certain criteria designed to promote consistency with the Federal Rules of Evidence ("F.R.E."). The committee explained:

> The Committee concluded that the numbering system of the Federal Rules should be followed for ease of reference and research. It was also determined that when only minor grammatical differences existed between the Federal Rules and the Uniform Rules, the language and punctuation of the Federal Rules was followed to facilitate the use of the decisions of the federal courts and those state courts which have adopted the Federal Rules verbatim. The Committee also had in mind the desire of the Idaho practitioners for one set of rules applicable in both the state and federal courts, but that concern did not outweigh other concerns when variances were deemed justified to accommodate Idaho practice.

M. Clark, Report of the Idaho State Bar Evidence Committee, Introduction, pp.1-2 (1983). As a result of the committee's expressed criteria, I.R.E. 801(d)(1)(B) was adopted and enacted in similar form to F.R.E. 801(d)(1)(B).

Both the Idaho Supreme Court and the Idaho Court of Appeals have embraced the premise that the Idaho Rules of Evidence be interpreted consistently with the Federal Rules of Evidence. *See* Chacon v. Sperry Corp., 111 Idaho 270, 273, 723 P.2d 814, 817 (1986) ("The general rule of construction which this Court has adhered to regarding the adoption of statutory language from another jurisdiction is that the adoption of that language is presumed to be with that jurisdiction's prior interpretation upon it"); State v. Caldero, 109 Idaho 80, 86, 705 P.2d 85, 91 (Ct. App. 1985) ("The counterpart federal rule of evidence is identical. It logically follows that the federal limitation upon extrajudicial statements by coconspirators, which excludes statements made during the 'concealment phase' of a conspiracy, should now apply in Idaho").

> **(B)** is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; . . . .

The Advisory Committee's Notes to the Federal Rules of Evidence make it clear that, under F.R.E. 801(d)(1)(B), prior consistent statements are admissible as substantive proof of a defendant's guilt. Tome v. United States, 513 U.S. 150, 162 (1995) (quoting Advisory Committee's Notes on Rule 801(d)(1)(B), at 773) ("'Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.'").

Given the similar language employed by F.R.E. 801(d)(1)(B), and as the Advisory Committee's Notes explain, "no sound reason is apparent why prior consistent statements should not be 'received generally,'" this Court should interpret I.R.E. 801(d)(1)(B) consistently with its federal counterpart, and hold that prior consistent statements may be used as substantive evidence because they are not hearsay. Because the district court correctly determined that Ms. Holland's statement to Rhoads, "You wrecked [. . .'s] car," was a prior consistent statement under the rule, its admission as substantive evidence was proper.

F. Any Error In The Admission Of Ms. Holland's Statement Was Harmless

Even if the Court concludes that it was error to admit Ms. Holland's statement, any error is harmless in light of the weight of the evidence presented at trial showing Rhoads' guilt. "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected...." I.R.E. 103(a); see I.C.R.

52 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). "The inquiry is whether, beyond a reasonable doubt, a rational jury would have convicted [the defendant] even without the admission of the challenged evidence." State v. Johnson, 148 Idaho 664, 669, 227 P.3d 918, 923 (2010) (citing Chapman v. California, 386 U.S. 18, 24 (1967); Neder v. United States, 527 U.S. 1, 18 (1999)).

Applying the standard of whether the evidence complained of contributed to the conviction shows, beyond a reasonable doubt, that the alleged error was harmless. If this Court finds that Ms. Holland's statement to Rhoads was admissible only as a prior consistent statement *and* only to rehabilitate her trial testimony (vis-à-vis as substantive evidence), the difference between the prohibited use and valid use would be miniscule. In short, admitting Ms. Holland's statement (that Rhoads was driving) for the limited purpose of rehabilitating her substantive trial testimony that Rhoads was driving, is not much different than admitting her statement as substantive evidence on its own right.

Moreover, the evidence of Rhoads' guilt as to his charged conduct was overwhelming. The testimony and evidence presented at trial, as set forth in the Statement of Facts, supra, are relied upon to show that, beyond a reasonable doubt, the statement Ms. Holland made to Rhoads could not have affected the jury's decision to convict him of felony driving under the influence and operating a vehicle without the owner's consent.

CONCLUSION

The state respectfully requests that this Court affirm Rhoads' convictions for felony driving under the influence and operating a vehicle without the owner's consent.

DATED this 8th day of July, 2013.

JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 8th day of July, 2013, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SALLY J. COOLEY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

JOHN C. McKINNEY
Deputy Attorney General

JCM/pm